THE CO-OPERATIVE CENTRAL BANK LTD.

v.

CHOH HONG KEE @ CHEOK KIEN YAP & ANOR.

HIGH COURT, KUALA LUMPUR
DATO' V.C. GEORGE J.
[CIVIL SUIT NO. D2-23-2997-87]
16 NOVEMBER 1993

PRACTICE & PROCEDURE: Appeal - SAR refusing to hear 1st defendant's application to strike out plaintiff's claim in priority to plaintiff's application to withdraw claim - Plaintiff's application allowed with liberty to file afresh - Whether SAR's discretion properly exercised - Whether any prejudice to 1st defendant.

The writ herein was issued in 1987 and statements of defence were filed by March 1988. On 27 July 1992 the plaintiff filed an application to withdraw the suit against the 1st defendant which was fixed for hearing on 28 October 1992 as it realised the demand made on the 1st defendant was invalid. On 12 October 1992 the 1st defendant filed an application to strike out the plaintiff's claim which was fixed for 16 November 1992. Upon the plaintiff's application coming up for hearing the 1st defendant applied for its application to be heard first but at that stage the 1st defendant had yet to serve its application. Accordingly the learned Senior Assistant Registrar (SAR) refused the 1st defendant's application and heard and allowed the plaintiff's application with liberty to file afresh. The 1st defendant appealed on the ground that the exercise of discretion to hear the plaintiff's application before the 1st defendant's application was wrong and also raised the question of the correctness of the plaintiff's contention that the demand was invalid.

Held:

[1] The Court will normally grant a plaintiff leave to discontinue the action if he wants to because it is not desirable that a plaintiff should be compelled to litigate against his will. However the Court will not grant him leave to withdraw the action if injustice will be caused to the defendant or if he will be deprived of an advantage which he has already gained by the litigation.

[2] The Court found no merit in the appeal. The plaintiff's application was first in time with the 1st defendant's application not having even been served. The 1st defendant was not able to show that any order made on the application to withdraw would cause any or any significant injustice or prejudice to him. The SAR could not be faulted on the exercise of her discretion.

[3] As the plaintiff was in the process of being wound up the Court found it unfair that the 1st defendant had to join a queue for any costs payable by the plaintiff. As the new writ had already been filed the Court directed that it be not further proceeded with until the costs awarded by the SAR in allowing the plaintiff's application was paid as taxed with liberty to apply. Costs of the appeal would be payed by the 1st defendant as taxed.

[Appeal dismissed with taxed costs to plaintiff].

Case referred to:

Co-operative Central Bank Ltd. v. Meng Kuang Properties Bhd.[1991] 2 MLJ 283 ***(cit)***

Other sources referred to:

White Book 1991, 21/2-5/11 paragraph

For the plaintiff/respondent - Y. Sivaloganathan; M/s. Siva Thurai Mariany & Co.

For the 1st defendant/appellant - Teh Meng Teck; M/s. Cheah Teh & Su

JUDGMENT

V.C. George J:

The Court will normally grant a plaintiff leave to discontinue the action if he wants to because it is not desirable that a plaintiff should be compelled to litigate against his will. However the Court will not grant him leave to withdraw the action if injustice will be caused to the defendant or if he will be deprived of an advantage which he has already gained by the litigation - See the 1991 **White Book** 21/2 - 5/11 last paragraph.

The writ herein was caused to be issued in 1987 - statements of defence were filed by March 1988. On 27 July 1992 the plaintiff filed its application encl. (32) to withdraw the action as against the 1st defendant. The plaintiff had come to realise that the demand it had made on the 1st defendant which was needed for there to be a cause of action could be ineffective and invalid on the ratio of the judgment in *Co-operative Central Bank Ltd. v. Meng Kuang Properties Bhd*. [1991] 2 MLJ 283. The application encl. (32) was originally fixed for 11 August

1992 and adjourned a number of times and eventually was fixed for 28 October 1992. In the meantime with the consent of the 2nd defendant the action as against him had been discontinued. On 12 October 1992 the 1st defendant filed its application, encl. (34), to strike out the statement of claim which was fixed for 16 November 1992.

On 28 October 1992 when encl. (32) was called, Counsel for the 1st defendant applied for the application encl. (34) to be heard before encl. (32). At that stage the plaintiff had not even been served with the application encl. (34) - it was only served on 13 November 1992. The Senior Assistant Registrar in the exercise of her discretion refused the application and heard and allowed the application (32). The 1st defendant appealed.

Before me Counsel for the 1st defendant appeared to rest the appeal primarily on the ground that the exercise of discretion to hear encl. (32) before encl. (34) was wrong. Counsel also questioned the correctness of the contention of the plaintiffs that the demand on which the statement of claim was based was ineffective.

In the context I do not think anything turned on the latter contention. In respect of the former it has to be borne in mind that encl. (32) was first in point of time. Encl. (34) had not even been served. The 1st defendant was not able to show that any order made on the encl. (32) application would cause any or any significant injustice or prejudice to him. Accordingly the Senior Assistant Registrar could not be faulted on the exercise of her discretion.

Apparently the plaintiff is in the process of being "wound up" and because of that it could be that if the action is discontinued and any order for the plaintiff to pay costs in respect of the action is made, the 1st defendant would have to join a queue of unsecured creditors unless the Court makes an order giving it priority in respect of the costs.

Accordingly I went on to hold as follows:

> I find no merit in the appeal. I find nothing so wrong in the exercise of the Senior Assistant Registrar's discretion that calls for interference with it by this Court.
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> However I think it is not fair that the 1st defendant finds that he has to join a queue for the costs. If that had been known I am certain the Senior Assistant Registrar would have ordered that costs be paid before the filing of the new writ.
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> As the new writ has already been filed, I direct that it be not further proceeded with until the costs awarded by the Senior Assistant Registrar in allowing the plaintiff's application encl. (32), is paid as taxed. With liberty to apply.
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> Costs of this appeal will be paid by the 1st defendant as taxed.